TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 332.

THE STEAMER "MAX MORRIS," HER ENGINES, &c.; JOHN MORRIS, CLAIMANT, APPELLANT,

vs.

PATRICK CURRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 10, 1887.

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Consent as to transcript	1	1
Libel and complaint	2	1
Claim	4	2
Answer	5	3
Opinion of Judge Brown	7	4
Decree	12	8
Notice of appeal to circuit court	13	8
Appeal	14	9
Stipulation to omit testimony from record, &c.	16	10
Hearing and submission	17	10
Opinion of Judge Wallace	18	10
Certificate of division	29	15
Decree	34	16
Notice of appeal to Supreme Court United States	38	17
Order allowing appeal	40	18
Petition of appeal	42	19
Appeal bond	50	21
Citation	57	23
Clerk's certificate	60	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 12, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 12, 1890.

1 I consent that the within printed matter be transmitted to the circuit court as the record in this case.

N. Y., March 4, 1886.

R. B. MARTINE,
Proctor for Lib'l't.

Apostles.

Circuit Court of the United States, Southern District of New York, in the Second Circuit.

PATRICK CURRY, Libellant and Respondent,
against
THE STEAMER MAX MORRIS, HER ENGINES, ETC., Whereof John Morris is Claimant and Appellant.

R. B. Martine, proctor for libellant and respondent; Butler, Stillman & Hubbard, proctors for claimant and appellant.

New York:
Evening Post job printing office, cor. Broadway and Fulton street.
(Law telephone 541.)
1886.

[Endorsed:] U. S. circuit court. Filed May 5, 1886. Timothy Griffith, clerk.

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of Patrick Curry against the steamship Max Morris, her engines, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, for a cause of tort, civil and maritime, for personal injuries, alleges as follows:

I. That as the libellant herein is informed and believes, the said steamship is now within this district.

II. That upon the 27th day of October, 1884, this libellant was lawfully on board the said steamship, being employed to load coal thereon by the stevedore who had the contract therefor.

III. That upon the evening of said 27th day of October, while upon said steamship, as above set forth, he fell from the bridge of said vessel to the deck.

IV. That the said libellant did so fall wholly through the carelessness and negligence of those in charge of the said steamship in having removed from the said bridge the ladder usually leading therefrom to the deck and in wholly failing to guard or in any manner to indicate the aperture left in the rail upon said bridge by the removal of said ladder, but leaving the same wholly open and undefended.

V. That this libellant was not guilty of any want of care or negligence.

3 VI. That by reason of this libellant's so falling to the deck he suffered severe injuries, breaking his collar-bone, injuring his side, and wounding his head and receiving a severe shock; that he has been and still is incapacitated for all labor, and is likely to remain so for a length of time. Libellant therefore alleges that by reason of the premises he has suffered injuries to his damage in the sum of three thousand dollars.

VII. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against said vessel, her engines, tackle, apparel, and furniture, and that all persons having or pretending to have any right, title, or interest in the same may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this honorable court would be pleased to pronounce for the claim aforesaid, with costs, and that said vessel, her tackle, engines, &c., may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as may be just.

his
PATRICK x CURRY.
mark.

Sworn to before me this 1st day of November, 1884.

JOSIAH T. LOVEJOY,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in New York Co.

RANDOLPH B. MARTINE,
Proctor for Libellant, 140 *Nassau Street, New York City.*

4 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the sixth day of November, in the year of our Lord one thousand eight hundred and —.

Present: The Hon. Addison Brown, district judge.

THE BRITISH STEAMER MAX MORRIS
ads.
PATRICK CURRY, Libellant.

And now James Sinclair Kirkpatrick, intervening as master of the British steamer Max Morris for the interest of John Morris, owner, in the said steamer, appears before the honorable court and makes claim to the said steamer, &c., as the same are attached by the marshal under process of this court, at the instance of Patrick Curry; and said James Sinclair Kirkpatrick avers that he was in possession of the said steamer at the time of the attachment thereof, and that the person above named is the true and *bona fide* managing owner

of the said steamer, and that no other person is the owner thereof, and the said James Sinclair Kirkpatrick is the true and lawful bailee thereof, as master; wherefore he prays to defend accordingly.

JAMES SINCLAIR KIRKPATRICK.

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant, 111 *Broadway, New York.*

5 CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

James Sinclair Kirkpatrick, being duly sworn, deposes and says that he resides in Liverpool, England; that he is the master of the above-named steamer, Max Morris; that the owner of said steamer resides in Liverpool, England, and that this deponent is duly authorized to put in this claim in behalf of the owner of the said steamer, and that the said claim is true of the knowledge of this deponent, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

JAMES SINCLAIR KIRKPATRICK.

Sworn to and subscribed this 5th day of November, A. D. 1884, before me—

C. S. SIMPSON,
[SEAL.] *Notary Public, N. Y. Co.*

To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

John Morris, owner and claimant of the British steamer Max Morris, as the same is proceeded against in this court on the libel of Patrick Curry, answers the said libel as follows:

First. The claimant admits that at the time the libel was filed the steamer Max Morris was within this district.

Second. The claimant admits that the libellant was upon said steamer on the 27th day of October, 1884, but that he was there at his own risk and not by the request of the claimant or his servants.

Third. The claimant admits that at about 7 o'clock in the
6 evening of the said 27th day of October, 1884, the libellant, while on board said steamer, fell from the after part of the bridge to the deck.

Fourth. The claimant admits that the place where the libellant fell was open, but denies each and every other allegation in the 4th and 5th articles of said libel contained.

Fifth. The claimant admits that the libellant sustained some injuries by his fall; admits the jurisdiction of the court, and denies each and every other allegation in the 6th and 7th articles of said libel contained.

Sixth. Further answering the said libel, the claimant avers that the libellant's fall was occasioned by his being in a part of the steamer where he had no right or occasion to be, and at a time of his own choosing, and that it was due to his own negligence, and was

not due to any fault or negligence or omission on the part of the claimant or his servants.

Wherefore the claimant demands judgment that the libel herein be dismissed with costs.

JOHN MORRIS,
By WILHELMUS MYNDERSE, *Proctor.*

Sworn to before me this 14th day of January, 1885.

JOHN LARKIN,
[SEAL.] *Notary Public, Kings County.*

Cert. in N. Y. Co.

7 *Opinion.*

BROWN, *J.:*

The libellant was one of a gang of stevedore's men who, on the evening of October 27, 1884, went aboard the steamship Max Morris, lying at her wharf, to shovel coal. In passing from forward aft the libellant was obliged to pass over what is termed the "lower bridge," a structure about 50 feet long, amidships, extending from rail to rail, and about 6 feet above the main deck. He went up a ladder of the usual kind, on the port side, passed directly aft on that side, and, finding an opening though the guard-rail at the after end of this lower bridge corresponding in place with the forward opening, supposing it to lead down to a ladder similar to the ladder forward—it being nearly dark, he did not observe and did not suspect that no ladder was there—and, putting his foot down to the supposed steps, lost his hold, fell to the main deck below, broke his collar-bone, and was for a time disabled. This libel was filed to recover his damages.

Each side strenuously contends that the other is solely to blame for this accident. The ship is claimed to be responsible because her construction was unusual; because this rear opening was dangerous, and calculated to mislead persons not previously acquainted with the peculiar structure of the ship; because the opening through the railing was in a place where a ladder would naturally be expected, and because, being unguarded by a chain or otherwise, and not notified to the libellant, it was no bettor than a pitfall for the unsuspecting workmen. The libellant is claimed to be solely responsible because he exercised no reasonable caution in going in the night time about a ship with which he was unfamiliar; because ships vary in the details of their construction as much as houses, and no set type can be presumed upon; because the opening in the rail at this place was not designed for a ladder, but for the play of the small boat which was upon the outer side of it; because no ladder had ever been there, and the opening was but 14 inches wide, whereas the opening for a ladder is always at least 18 inches wide, and because it was evident carelessness, as it is said, for a laborer to push through so narrow an opening at night and undertake to
8 go down without first ascertaining whether there was a ladder there or not.

The evidence shows that the construction of this "lower bridge" was somewhat unusual, but not unexampled, and that the descent aft was on the starboard side from a platform extending fore and aft and facing amidships. The experts examined differed as to the propriety or necessity of a guard at an opening of but 14 inches, such as that through which the libellant fell. The very competent expert on the part of the steamship apparently based his testimony, in part at least, upon the assumption that a man could not pass through such an opening without turning or squeezing. Experiment, however, shows that this might possibly be done, though not readily, and that it would not be likely to happen in a person's ordinary movements, the rail being about three feet high.

The considerations urged upon each side are manifestly entitled to weight, and I find myself constrained to hold each in substantial fault contributing to the accident. It is impossible to absolve landsmen accustomed to work upon vessels in port from reasonable care and attention to their movements about vessels with which they are unacquainted. The darkness in this case made it the duty of the libellant to exercise the greater care in his movements or else to supply himself with one of the several lights that were provided by the ship, but were unused. On the other hand, reasonable consideration for the safety of workmen coming on board is a duty imposed by law upon the owners and masters of vessels, both from humanity to the workmen and from policy to prevent them from becoming through accident a public charge. Reasonable consideration demands that some safeguards shall be provided against any peculiarities of the vessel that are naturally calculated to mislead the unwary and to involve them in danger and injury unawares. Though this opening was somewhat smaller than the usual opening for ladders it was not so small as to be impracticable for such a use. The difference was slight—certainly not sufficient to be ordinarily observable in the dark nor sufficient to be in itself a notice that the opening was not a passage-way or to serve as a warning in the night time, when its small size might not be, and in this case was not, perceived. While its position, where a ladder is usually found and being opposite to the forward ladder, afforded so strong a natural supposition that a ladder was there that not a doubt of it occurred to the libellant, in my judgment it was clearly dangerous. It should have been guarded by a chain or some other precautionary measure, such as might easily have been provided.

9

The Manhassett, 19 Fed. Rep., 430.
The Pilot Boy, 23 Fed. Rep., 103.

As I must find the libellant also chargeable with negligence in the particulars above mentioned, the question is presented whether in a court of admiralty, in a case of personal injuries to landsmen arising from the concurrent negligence of the ship and of the libellant, any damages can be awarded or whether the libel must be dismissed according to the rule in common-law cases. That the rule

of the municipal law should be followed has been presumed or implied in several cases in the district courts.

See The Germania, 9 Ben., 356.
Holmes *v.* Oregon & C. R'y Co., 5 Fed. Rep., 523, 538.
The Chandos, 4 Fed. Rep., 645, 649.
The Kate Cann, 8 Fed. Rep., 719.
The Manhassett, 19 Fed. Rep., 430.

The cases of Sunney *v.* Holt, 15 Fed. Rep., 880, and Dwyer *v.* National S. S. Co., 17 Blatchf., 472; S. C., 4 Fed. Rep., 493, were cases at law. The cases cited of injury through the negligence of fellow-servants are not applicable.

This question has recently been carefully examined in the circuit court by Judge Pardee, of the fifth circuit, in the cases of The Explorer, 20 Fed. Rep., 135, and The Wanderer, *id.*, 140. No decision has been made upon the precise point in this circuit. It is clear that in admiralty causes, even in case of personal injuries, this court is not strictly bound by the common-law rules. The language of the Supreme Court in The Marianna Flora, 11 Wheat., 54, and The Palmyra, 12 Wheat., 1, cited by Judge Pardee,
10 sufficiently shows this; but the same considerations of justice, of prudence, and of policy which have caused that rule to be adopted so widely in the common law and in the civil law should, doubtless, lead to its observance in ordinary cases in admiralty (see The E. B. Ward, Jr., 20 Fed. Rep., 702). "A party who is *in delicto*," says Story, J., in The Marianna Flora, above cited, "ought to make a strong case to entitle himself to general belief."

But not infrequently cases do arise in which the common-law rule is manifestly inequitable; strong cases in which justice, humanity, and public policy alike demand that those who by their concurrent negligence have caused great suffering and injury to those dependent upon their daily earnings for support should not be exempted from all charge simply because some contributory fault may be found in the sufferer. The practice in admiralty to apportion damages in cases of mutual fault is not strictly confined to collisions and prize causes. It has been applied in this district and in this circuit to cases of loss by negligent navigation by tugs, where both parties are chargeable with fault and public policy demands that both be made responsible (The Wm. Murtaugh, 3 Fed. Rep., 404; S. C., 17 Fed. Rep., 260; The Wm. Cox, 3 Fed. Rep., 645, affirmed in the circuit court, 9 Fed. Rep., 672; Connolly *v.* Ross, 11 Fed. Rep., 342; The Bordentown, 16 Fed. Rep., 270); where the tow was not in proper condition (Philadelphia and R. R. Co. *v.* New England Transp. Co., 24 Fed. Rep., 505; The Oswego, 8 Ben., 129); to injuries of boats on the bottom of slips (Christian *v.* Van Tassel, 12 Fed. Rep., 884); to injuries to old boats (The Syracuse, 18 Fed. Rep., 1828; The Reba, 22 Fed. Rep., 546); and, by Judge Sprague, to loss by leakage from different causes attributable to each party (Snow *v.* Carruth, 1 Spr., 324).

These cases proceed upon an equitable judgment and discretion that are admissible in the admiralty to a greater extent than exist

in common-law causes. Where the common-law rule controls or is supposed to be binding, the demands of obvious justice are constantly leading to new modifications of what shall be deemed such contributory negligence as to bar recovery and to the adop-
11 tion of peculiar views of the facts, both by the court and by juries, such as would not be taken but for the hardship of the case.

Deference to the ruling of the circuit judge of the fifth circuit in the cases above quoted, as well as the approval of my own judgment, leads me to follow the rule suggested by him in cases of this kind, involving great hardship and suffering, at least until this view be overruled, viz., "to give or withhold damages according to principles of justice and equity, considering all the circumstances of the case, not as full compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury." This rule has been again recognized by him in the case of The Mabel Comeaux, 24 Fed. Rep., 490, though not applied, because the vessel was found not in fault. I may add that the same considerations of public policy that demand that every person shall take proper care of himself, Shear. & R. Neg. (2d ed.), § 42, also demand that ships in port, on board which accidents are constantly multiplying from the increasing complications of their arrangements and from their modern appliances, shall not be practically exempted from the duty of taking any reasonable precautions against accident by proof of some slight fault in the sufferer, and that they shall not, by their fault and negligence, cause those who are dependent on their daily earnings for support to become a burden and a charge upon the public. "The moiety rule in collision causes was adopted," says Bradley, J., in The Alabama, 92 U. S., 697, "for the better distribution of justice among mutual wrong-doers." See also, per Nelson, J., The Catherine, 17 How., 170; The Hudson, 15 Fed. Rep., 166.

The more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will, I think, be clearly best promoted by holding vessels liable to bear some part of the actual pecuniary loss, where their fault is clear, provided that the libellant's fault, though evident, is neither wilful nor gross nor inexcusable, and where the other circumstances present a strong case for his relief. Such a rule will certainly not diminish
12 the care of laborers for their own safety, while it will surely tend to quicken the attention of the owners and masters of vessels towards providing all needful means for the safety of life and limb.

The libellant in this case was treated at the public hospital without charge. His collar-bone was broken. He was disabled from work for about three months, and, though working steadily now, suffers some drawbacks from the accident and probably will do so throughout his life. This is a case sufficiently strong, as it seems to me, to require the claimants to bear some part of the damage that their concurrent negligence occasioned. Following the precedent of The Explorer, *supra*, I shall charge to the libellant's own fault all

his pain and suffering and all mere consequential damages, and charge the vessel with his wages at the rate of two dollars per day for 75 working days, making $150; for which sum a decree may be entered, with costs.

At a — term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Wednesday, the 28th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Addison Brown, district judge.

PATRICK CURRY
vs.
THE STEAMSHIP MAX MORRIS, HER ENGINES, &c.

This case having been heard on the pleadings, depositions, and proofs, and having been argued and submitted by the advo-
13 cates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the said libellant, Patrick Curry, recover from the said steamship the sum of one hundred and fifty dollars for his damages, together with the sum of thirty-two and $\frac{33}{100}$ dollars, being one-half of his costs as taxed, making together the sum of one hundred and eighty-two and $\frac{33}{100}$ dollars, less one-half the amount of the claimant's costs as taxed, to wit, the sum of forty-seven and $\frac{6}{100}$ dollars, making the total sum awarded to the libellant by this decree one hundred and thirty-five dollars and twenty-seven cents; and it is further—

Ordered, adjudged, and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time provided by the rules of practice of this court, then that the claimant's stipulators for costs and for value cause the engagements of their stipulations to be performed or show cause within four days thereafter why execution should not issue against them, their lands, goods, and chattels, according to their stipulation. ADDISON BROWN.

District Court of the United States, Southern District of New York.

PATRICK CURRY, Libellant,
against
THE STEAMER MAX MORRIS, HER ENGINES, &c., Whereof John Morris is Claimant.

Please take notice that the claimant above named hereby appeals from the final decree entered herein on the 4th day of Novem-
14 ber, 1885, to the next circuit court to be held in this district, in so far as it does not wholly dismiss the libel herein, with costs.

New York, November 4, 1885.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant.

To S. H. Lyman, Esq., clerk U. S. district court, southern district of New York.

District Court of the United States, Southern District of New York.

PATRICK CURRY, Libellant and Appellee,
against
THE STEAMER MAX MORRIS, HER ENGINES, &c., Whereof John Morris is Claimant, Appellant.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named claimant and appellant respectfully shows—

That on the 1st day of November, 1884, the above-named libellant filed his libel in this court against said steamer Max Morris, her engines, &c., claiming to have sustained damages in the sum of $3,000 by reason of the matters and things set forth in the libel, and praying, among other things, that process might issue against said steamer, and that the same might be condemned and sold to satisfy the libellant's claim, as will more fully appear by reference to said libel.

15 That process was accordingly issued and said steamer was attached.

That on the 6th of November a claim was filed to said steamer by John Morris with a stipulation for value in the sum of $3,000 and a stipulation for costs, with good and sufficient sureties, and said steamer was thereupon released, and that on the 15th January, 1885, the claimant filed his answer to said libel, praying, among other things, that said libel might be dismissed with costs, as by reference to said answer will more fully appear.

That the said cause came on for hearing before the Hon. Addison Brown, district judge, on the 9th June, 1885, on the pleadings, depositions, and proofs adduced by the respective parties, and on the 6th of August the cause was finally argued and submitted, and the said judge, having advised thereon, did on the 22d of August, 1885, render a decision in said action whereby he found the claimant negligent and guilty of fault in certain particulars, and did therefore award to the libellant the sum of $150 for his damages, costs to be apportioned, and, said costs having been taxed, and there being an excess of costs of $14.73 in claimant's favor, the said court did on November 5, 1885, make and enter a final decree in favor of the libellant and against said steamer Max Morris for the sum of $135.27, as by reference to said decision and decree will more fully appear.

And this appellant is advised and insists that said decision and decree are erroneous, inasmuch as the said steamer Max Morris is not liable for the libellant's alleged damages, and in that said libel should have been dismissed with costs.

And this appellant for this and other reasons appeals from said decree in so far as it does not wholly dismiss the libel herein, with costs to the next circuit court to be held in this district, and on said appeal he intends to have said cause heard anew in the circuit

court on the pleadings and proofs in the district court and other proofs to be introduced in the circuit court.

And this appellant prays that the records and proceedings of the district court may be returned to the circuit court, and that
16 the said decree may be reversed in so far as it does not wholly dismiss the libel, with costs, and that the libellant be condemned to pay this appellant his costs and damages in the premises.

New York, January 20, 1886.

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant.

District Court of the United States.

PATRICK CURRY, Libellant,
vs.
THE STEAMER MAX MORRIS.

It is hereby stipulated and agreed that the testimony taken in this cause be omitted from the record on appeal, and in consideration thereof we further stipulate that the facts as stated in the opinion of the district judge be taken as the facts proved in said cause, and that the appeal be heard upon the facts stated in such opinion and upon the law.

Dated Feb'y 11, 1886.

R. B. MARTINE, *Libellant's Proctor.*
BUTLER, STILLMAN & HUBBARD,
Claimant's Proctors.

17 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the fourth day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable William J. Wallace, circuit judge.

PATRICK CURRY, Libellant & Appellee,
vs.
THE STEAMER "MAX MORRIS," ETC.
Cal. Appeals in Admiralty. April Term, 1886.

The above cause coming on this day for hearing on appeal—

Mr. James A. Patrick is heard in behalf of libellant and appellee.

Mr. Wilhelmus Mynderse is heard in behalf of claimant and appellant.

C. A. V.

18 United States Circuit Court, Southern District of New York.

CURRY
vs.
THE MAX MORRIS.

WALLACE, *J.:*

The libellant, while engaged as a laborer upon the steamer, fell through an unguarded opening at a place at which he supposed

there was a ladder, and was hurt. The district court decided that the accident was attributable to the concurring negligence of both parties, and apportioned the damages to the libellant by allowing him compensation for his immediate pecuniary loss in time and wages and disallowing him for his pain and suffering or other consequential damages. The case has been brought here on appeal to determine the question whether the rule of admiralty for apportioning damages in collision is to be extended to ordinary actions for personal injuries sustained on board vessels by laborers, seamen, passengers, or others by reason of the concurring negligence of the party injured and those for whose conduct the ship is responsible, or whether the rule of the municipal law is to prevail, which denies a recovery to a party when his own negligence has contributed to produce the injury.

If the rule which was adopted by the learned judge of the district court could be sanctioned and applied generally in actions of the character of this, it could be flexibly adjusted to the equitable considerations of each case, and would thus enable a fair distribution of the loss resulting from the mutual fault of parties to be made. But the court cannot be controlled by this consideration. The question is not whether it would be convenient or salutary to adopt a new rule of responsibility or damages in actions other than those for a collision, but whether such a rule already exists, and may therefore be applied. In the language of Lord Kenyon: "I cannot legislate, but by industry I can discover what our predecessors have done, and I will tread in their footsteps." Although it has been said that "in cases of marine torts courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positve boundaries of mere municipal law," and that "they have exercised a conscientious discretion upon the subject." (Story, J., in The Marianna Flora, 11 Wheat., 1.) These observations do not imply that such courts do not proceed upon settled rules equally with courts of equity or of common law. The most certain evidence of these rules is to be found in the reports of their decisions. If these fail to denote the recognition of a principle or the application of a rule which is invoked in the case in hand, and the facts are not new, but are similar in substance to those which have frequently been the subject of judicial treatment, the absence of authority is persuasive evidence that no such principle or rule exists.

No authority is found for the rule apportioning damages in cases of mutual fault, except in causes of collision, negligent navigation, and possibly of prize, in the decisions or in the text books earlier than the recent case of The Explorer, 20 Fed. Rep., 135. The learned judged who decided that case concedes that he had not been able to find "that, outside of collision and prize cases, the admiralty courts have claimed or exercised a different rule as to cause of contributory, concurrent, or comparative negligence from that applied generally in courts of law and equity in cases of damage and torts suffered on land." On the other hand, it has been repeatedly de-

cided, directly or by implication, prior to the present case, by the district courts in this circuit, that when the negligence of the party injured contributed to produce the injury he could not recover. In The Germania, 9 Ben., 356, Blatchford, J., stated the rule as follows:

"The owner of the vessel is liable *in personam*, and the vessel is liable *in rem*, for injuries done to person or property by the negligence of the master and crew of the vessel only where the owner would, under the same circumstances, be liable in a suit at common law."

This was also assumed to be the rule by Benedict, J., in The Calista Hawes, 14 Fed. Rep., 493. The members of the pro-
21 fession in this circuit have hitherto acquiesced in these decisions, and the circuit court until now has never been called upon to question their correctness by an appeal. In The Rheola, 19 Fed. Rep., 926, it was also assumed by the circuit judge to be the rule that the libelant could not recover for personal injuries if his negligence had contributed to produce them. That this has been the understanding of the law in other circuits is manifest by the opinions of Deady, J., in The Chandos, 4 Fed. Rep., 645, and in Holmes *v.* Oregon R. Co., 5 Fed. Rep., 523, and by the opinion of Hughes, J., in The Manhasset, 19 Fed. Rep., 430; see also Henry, Adm., sec. 77.

The rule of admiralty in collisions apportioning the loss in case of mutual fault is peculiar to the maritime law. It is not derived from the civil law, which agrees with the common law in not allowing a party to recover for the negligence of another, where his own fault has contributed to the injury. Whart., Neg., sec. 300. It emanated from the ancient maritime codes, and the reasons which are assigned by commentators as commending it are various and divergent. According to Clierac (1 Bell. Comm., 5th ed., 581), "this rule of division is a rustic sort of determination and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties or when they see fault on both sides." He thought its object was to prevent owners of old and worthless ships from getting them run down on purpose in order to found a claim for excessive damages. Mr. Bell defends the rule upon expediency, "because," he says, "there ap-
22 pears to be no sufficient protection without some such rule for weak ships against stronger and larger ships, the masters and crews of which will undoubtedly be more careless when they know that there is little risk of detection and none at all of direct damage to their vessel, by which a smaller ship may be run down without any injury to the assailant." Lord Denman in Devaux *v.* Salvador, 4 Adol. & E., 420, says: "It grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated from natural justice nor, possibly, quite consistent with it."

By the laws of most of the maritime States the rule was applied indiscriminately in collisions when both vessels were to blame, when neither was to blame, and when the blame could not be detected.

Abb. Shipp., 229. In a recent article in the Law Quarterly Review (July, 1886, vol. 2, p. 362), Mr. Marsden traces the history of the recognition of the general maritime law on this subject by the English admiralty courts, and shows that in the earlier cases the rule of division of loss was applied when there was no fault in either ship and when the cause of collision was uncertain, as well as in cases when both ships were at fault. Since the Woodrop Sims, 2 Dods., 83, the rule has only been applied in the case of both ships in fault, and, as thus applied, is now adopted as a part of the general municipal law of England by the judicature act of 1873.

23 In our own courts it may still be regarded, perhaps, as an open question whether apportionment is the rule where the fault is inscrutable as well as when both vessels are in fault, or whether only when both vessels are in fault. The Grace Girdler, 7 Wall., 196; The John Henry, 3 Ware, 264; The David Dows, 16 Fed. Rep., 154; The Comet, 1 Abb., 451; The Breeze, 6 Ben., 14; The Summit, 2 Curt., 150.

If no trace is to be found of any doctrine of inability or rule of damages in cases of marine torts which is peculiar to the admiralty except that which obtains in cases of collision, and has exclusive reference to the conduct of ships towards each other and the faults or accidents incident to their navigation, resort may be had to the principles or analogies of the common law or of the civil law when a new question arises, and it has also been said that local statutes or general statutes not obligatory upon courts of admiralty furnish a rule of decision. The Highland Light, Chase, Dec., 150; Steamboat *v.* Phœbus, 11 Pet., 175; Steamboat Co. *v.* Chase, 16 Wall., 531; Cutting *v.* Seabury, 1 Spr., 522; The Lottowanna, 21 Wall., 558. Ordinarily, to determine the right remedies of parties for marine torts, the courts recur to the rules of the common law to ascertain what acts are marine torts. Peterson *v.* Watson, Blatchf. & H., 487. In the language of the decisions, marine torts are said to embrace wrongs committed by direct force, and those suffered in consequence of the negligence or malfeasance of others, "where the remedy at common law is by an action on the case." Philadelphia, W.

24 & B. R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How., 216; Leathers *v.* Blessing, 105 U. S., 630.

As has been stated, both the common law and the civil law agree in denying a right of recovery for negligence when the negligence of the party injured has concurred in producing the injury. The reason for the rule is sometimes said to be based upon grounds of public policy, which require, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected; but the reason more commonly assigned why contributory negligence is never considered in mitigation of damages, but is deemed a complete defense, is because "the law has no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief." Railroad Co. *v.* Norton, 24 Pa. St., 469; Greenland *v.* Chaplin, 5 Exch., 243, 247; Wilds *v.* Hudson River R. Co., 24 N. Y., 432. The language of Strong, J., in Heil *v.* Glanding, 42 Pa. St., 493, 499, is as follows:

"The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other is not that the wrong of the one is set off against the wrong of the other; it is that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover it might be that he would obtain from the other party compensation for his own misconduct."

It would seem that either of the reasons assigned should be
25 as controlling with a court of admiralty as in a court of common law. It is also to be observed that the rule relates to the cause of action, and denies any right of recovery, and is not one of damages for ascertaining what measure of compensation should be awarded.

The question presented by this appeal is both novel and interesting. Cases similar to this are now frequently brought in the district courts, but those in which the amount involved is sufficient to enable an appeal to be brought from this court to the supreme court are very rare, and it follows that the decisions of the circuit courts must be accepted as final and as definitely determining the law of such cases for probably many years. The judgment of the circuit court in the case of the Explorer is embodied in a carefully considered opinion and is entitled to great weight in this court; but whatever doubts might be entertained of its correctness or of the duty of this court to yield to its authority as the judgment of a court of co-ordinate jurisdiction, pronounced after full consideration by a judge whose opinions always command the highest respect, have been removed by a decision of the supreme court which seems to have been overlooked by counsel as well as by the judges who have hitherto considered the question involved. In Atlee *v.* Packet Co., 21 Wall, 389, there was an appeal in admiralty from a decree of the circuit sourt of the district of Iowa awarding damages to the owners of a barge which was injured by being run against a
26 stone pier built by the respondent in a navigable part of the Mississippi river. The circuit court decided that the pier was an unlawful obstruction and decreed for the whole damages sustained by the libelant, but the Supreme Court, although agreeing that the pier was an unlawful structure and that the respondent was liable, decided that the pilot of the barge was guilty of negligence for want of knowledge of the pier and for hugging the shore when, by proceeding further out in deep water, his vessel would have been safe, and reversed the decree below by dividing the damages. The question whether damages should be divided in such cases was considered and disposed of, Mr. Justice Miller delivering the opinion of the Court in the following language:

"But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating

the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiff such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By
27 the rule of the admiralty court, where there has been such contributory negligence or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff, who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum. It is not intended to say that the principles which determine the existence of mutual fault, on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially.

Upon these views of the law the collision rule for dividing damages can no longer be considered as applicable only to cases involving the rights and responsibilities of parties for colliding vessels. The principles enunciated apply to all cases of marine tort founded upon negligence, without regard to any peculiar considerations of maritime policy for regulating the conduct of ships towards each other or to any exceptional rules of practice adopted by the admiralty courts because of the intrinsic difficulty in collision cases of locating the fault or the cause of the disaster. This decision covers the whole ground and fully sustains the ruling in the Explorer and in
28 the district court.

The decree of the district court is affirmed.

R. B. Martine, for libelant and respondent; Butler, Stillman & Hubbard, for claimant and appellant.

29 At a circuit court of the United States held in and for the southern district of New York on the fourteenth day of March, 1887.

Present: The Hon. Samuel Blatchford, circuit justice; the Hon. William J. Wallace, circuit judge.

PATRICK CURRY, Libellant and Respondent,
vs.
THE STEAMSHIP MAX MORRIS, HER ENGINES, &c., Whereof John Morris is Claimant and Appellant.

This is an action in admiralty under a libel, filed on the 1st day of November, 1884, in the United States district court for the southern district of New York to recover for personal injuries suf-
30 fered by the libellant on board the said steamship Max Morris, in the port of New York, on the 27th day of October, 1884.

The libellant was a longshoreman, a resident of the city and county of New York, and was at the time when the said accident occurred employed as longshoreman by the hour by the stevedore

having the contract to load coal on board the steamship Max Morris. The injuries to the libellant were occasioned by his falling through an unguarded opening in the rail on the after end of the lower bridge. The Max Morris was a British steamship, hailing from Liverpool, England.

The defendant contends, as a matter of defense to said libel, that the injuries complained of by libellant were caused by his
31 own negligence. The libellant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The court finds, as a matter of fact, that the injuries to the libellant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel.

It now occurs as a question of law whether the libellant under the above facts is entitled to a decree for divided damages.

On this question the opinion of the judges are in conflict.

Whereupon, on motion of the advocate for the claimant and appellant that the point on which the disagreement has happened may during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided—

32 It is ordered that this statement of facts and the said question in difference be certified, according to the request of the claimant and appellant and the law in that case made and provided, under the seal of this circuit court, to the Supreme Court of the United States.

SAM'L BLATCHFORD.
WM. J. WALLACE.

Above statement of facts correct.

BUTLER, STILLMAN & HUBBARD,
For Claimant.
RANDOLPH B. MARTINE, *For Libellant.*
JAMES A. PATRICK, *Advocate.*

(Endorsed:) U. S. circuit court, southern district of New York. Patrick Curry, libellant and respondent, *vs.* The Steamship Max Morris, her engines, &c., whereof John Morris is claimant
33 & appellant. Certificate of division. Butler, Stillman & Hubbard, 111 Broadway, New York. U. S. circuit court. Filed Mar. 17th, 1887. Timothy Griffith, clerk.

34 At a general term of the circuit court of the United States for the southern district of New York, held at the United States court-room, in the city of New York, on the 14th day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: Hon. Samuel Blatchford, circuit justice; Hon. William J. Wallace, circuit judge.

PATRICK CURRY, Libellant & Respondent,
ag'st
THE STEAMSHIP MAX MORRIS, HER ENGINES, TACKLE, &c., Appellant.

35 This cause having been heard on the pleadings, depositions, and proofs from the district court of this district and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had in the premises, it is now ordered, adjudged, and decreed (the judges being divided in opinion) that the decree of the United States district court of the southern district of New York, made and entered in this cause, be, and the same hereby is, in all things affirmed, and that the said libellant recover of said steamship, her engines, tackle, &c., the sum of one hundred and thirty-five dollars and twenty-seven cents, with interest thereon from the 28th day of October, 1885, together with the sum of twenty-six dollars and thirty cents, his costs and disburse-
36 ments in this cause as taxed, making the total sum awarded to the libellant by this decree one hundred and seventy-two dollars.

And it is further ordered, adjudged, and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time provided by the rules and practice of this court, then that the claimant and appellant, stipulators for costs and for value, cause the engagements of their stipulations to be performed, or show cause within four days thereafter why execution should not issue against them, their lands, goods, and chattels, according to their stipulations.

WM. J. WALLACE.

Form correct.
B., S. & H.
R. B. M.
J. A. P.

(Endorsed:) Circuit court of the United States for the south-
37 ern district of New York. Patrick Curry, libelant & respondent, against The S. S. Max Morris, her engines, tackle, &c., appellant. Decree. Randolph B. Martine, proctor for libellant, 140 Nassau street, New York city. U. S. circuit court. Filed Mar. 17th, 1889. Timothy Griffith, clerk.

38 Circuit Court of the United States for the Southern District of New York.

PATRICK CURRY, Libellant & Appellee,
ag'st
THE STEAMER "MAX MORRIS," HER ENGINES, &c., Whereof John Morris is Claimant, Appellant.

Please take notice that the claimant in the above-entitled action appeals to the Supreme Court of the United States from the decree

of the circuit court of the United States for the southern district of New York, entered in said action by a divided court on the 17th day of March, 1887, in favor of the libellant and against the claimant, for the sum of one hundred and seventy-two dollars, and from each and every part of the said decree.

39 New York, March 28, 1887.

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant, Appellant.

To Timothy Griffith, Esq., clerk of the United States circuit court for the southern district of New York; Randolph B. Martine, Esq., proctor for libellant, appellant, 144 Nassau street, New York city.

(Endorsed:) U. S. circuit court, southern district of New York. Patrick Curry, libellant and appellant, ag'st The Steamer "Max Morris," her engines, &c., whereof John Morris is claimant, appellant. Notice of appeal. Butler, Stillman & Hubbard, proctors for claimant, 111 Broadway, New York. U. S. circuit court. Filed Mar. 28th, 1887. Timothy Griffith, clerk.

40 At a stated term of the circuit court of the United States for the southern district of New York, held in the United States court-rooms, in the city of New York, on the 28th day of March, 1887.

Present: Hon. William J. Wallace, circuit judge.

PATRICK CURRY, Libellant & Appellee,
vs.
THE STEAMER "MAX MORRIS," HER ENGINES, &c., Whereof John Morris is Claimant, Appellant.

On reading and filing the annexed petition of appeal of the claimant in the above-entitled action, and a supersedeas bond in

41 due form and in the sum of three hundred dollars, with sufficient sureties, conditioned that the claimant shall prosecute his said appeal to effect and answer all damages and costs if the claimant fail to make the said appeal good, having been given, it is now, on motion of Butler, Stillman & Hubbard, proctors for the claimant, ordered that the said appeal be, and the same hereby is, allowed to the Supreme Court of the United States, and that the said bond be accepted, and that execution on the decree herein be stayed pending the hearing of this appeal.

WM. J. WALLACE.

42 Circuit Court of the United States, Southern District of New York.

PATRICK CURRY, Libellant & Appellee,
ag't
THE STEAMER "MAX MORRIS," HER ENGINES, &c., Whereof John Morris is Claimant, Appellant.

To the honorable the Supreme Court of the United States:

The appeal of John Morris, claimant and appellant herein, respectfully shows—

That on or about the 1st day of November, 1884, the libellant and appellee above named exhibited his libel in the district court of the United States for the southern district of New York against the above-named steamer "Max Morris," her engines, boilers,
43 tackle, apparel, and furniture, claiming damages in the sum of three thousand dollars for the reasons set forth in the said libel, and praying, among other things, that the said steamer might be condemned and sold to pay the said damages with costs.

That process thereupon duly issued out of said court against the said steamer "Max Morris," and that thereupon the claimant and appellant herein appeared and filed a claim to the said steamer and a stipulation for value of the same in the amount of three thousand dollars.

That thereafter and on or about the 15th day of January, 1885, the said claimant filed his answer to the said libel in the said district court, praying, among other things, that the said libel be dismissed with costs to the claimant, as by reference to said
44 answer may more fully appear.

That on the 9th day of June, 1885, the said cause came on to be heard before the Honorable Addison Brown, judge of the said district court, upon the pleadings, testimony, and proofs advanced by the respective parties and the depositions and proofs taken in the said cause by them, and the said judge having advised thereon did on the 22d day of August, 1885, make a final decree in said cause, whereby it was, among other things, ordered, adjudged, and decreed that the libellant recover against the claimant the sum of one hundred and thirty-five $\frac{27}{100}$ dollars, his damages and costs.

That thereafter your petitioner, the appellant, duly appealed to the circuit court of the United States for the southern district
45 of New York, in the second circuit, and the said cause was thereby removed to the said circuit court and was there tried anew before the Honorable William. J. Wallace, circuit judge, and Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States, sitting as circuit justice in the said circuit court, sitting together, on the pleadings, depositions, testimony, and proofs taken in the district court, and, a question having occurred on the trial upon which the said judge and the said justice were divided in opinion, the said judge and the said justice did thereafter, to wit, on the 17th day of March, 1887, make

and file, as provided by law, a certificate to the effect that their opinions were opposed upon a question which occurred on the trial and hearing of said cause; and on said 17th
46 day of March, 1887, the said circuit court made, in accordance with the opinion of the presiding judge, the circuit court justice dissenting, a final decree in the said cause, whereby it was adjudged and decreed that the libellant, Patrick Curry, have and recover against the claimant the sum of one hundred and seventy-two dollars; and this claimant and appellant is advised and insists that the said decree is erroneous, inasmuch as the opinion of the circuit justice on the question upon which there was a division of opinion was correct, and that there should have been a decree in favor of this claimant and appellant for his costs in the district and circuit courts.

And this claimant and appellant, for these and other
47 reasons, feeling aggrieved by the said decree, hereby appeals from the whole of said decree of the said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of the said circuit court and the libel, answers, pleadings, the certificate of division made and filed by the said judge and the said justice, and all other necessary proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause and finally decide the question upon which the said judge and the said justice differed in opinion, and that the said decree of the said circuit court and every part thereof may be reversed,
48 and that a mandate may be issued to the said circuit court directing that the said decree be reversed, and that a decree be entered in favor of the claimant and appellant for his costs, or that such other decree be made as to the said Supreme Court shall seem fit.

New York, March 28, 1887.

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant & Appellant.

(Endorsed:) U. S. circuit court, southern district of New York. Patrick Curry, libellant & appellant, against The Steamer "Max Morris," her engines, &c., whereof John Morris is claimant, appellant. Petition of appeal and order. Butler, Stillman & Hubbard, proctors for claimant, 111 Broadway, New York. Due and timely and personal service of copies of within petition of
49 appeal and order is hereby admitted. Randolph B. Martine, proctor for libellant. U. S. circuit court. Filed Mar. 28th, 1887. Timothy Griffith, clerk.

50 Circuit Court of the United States, Southern District of New York.

PATRICK CURRY, Libellant & Appellee,
ag'st
THE STEAMER "MAX MORRIS," HER ENGINES, &c., Whereof John Morris is Claimant, Appellant.

Know all men by these presents that we, John Morris, —— ——, are held and firmly bound unto the above-named appellee, Patrick Curry, in the sum of three hundred dollars, to be paid to the said appellee; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

51 Sealed with our seals and dated this 28th day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas a final decree has been rendered by the circuit court of the United States for the southern district of New York in the above-entitled action in favor of the libellant and appellee above named and against the claimant and appellant for the sum of one hundred and seventy-two dollars, wherein it is certified, as provided by law, by the judges who held the term at which this action was tried that their opinions were opposed upon a question which occurred on the trial or hearing of said action;

And whereas the said decree was filed in the office of the clerk of the said circuit court of the United States for the southern
52 district of New York on the 17th day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

And whereas the claimant above named, John Morris, feeling aggrieved thereby, has appealed from the said final decree of the said circuit court to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such that if the above-named claimant shall prosecute his said appeal to effect and answer all damages and costs if he fails to make the said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN MORRIS,
Per BUTLER, STILLMAN & HUBBARD,
Proctors. [L. S.]
J. HOOD WRIGHT. [L. S.]
G. S. BOWDOIN. [L. S.]

Signed, sealed, and delivered, taken, and acknowledged in my presence this 28th day of March, 1887.

GEO. P. GORDEL,
Notary Public, N. Y. Co.

[L. S.]

53 CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

J. Hood Wright, being sworn, deposes and says that he resides in the city of New York, and that he is a householder within the State of New York and worth the sum of six hundred dollars over and above all his just debts and liabilities.

J. HOOD WRIGHT,
Kingsbridge Road & 174 St.

Sworn to before me this 28th day of March, 1887.
GEO. P. GORDEL,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

George S. Bowdoin, being duly sworn, deposes and says that he resides in the city of New York, and that he is a freeholder within the State of New York and worth the sum of six hundred
54 dollars over and above all his just debts and liabilities.

G. S. BOWDOIN.

Sworn to before me the 28th day of March, 1887.
GEO. P. GORDEL,
[L. S.] *Notary Public, N. Y. Co.*

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

On this 28th day of March, 1887, before me personally came J. Hood Wright, to me personally known and known by me to be one of the persons named in and who executed the foregoing instrument, and severally acknowledged that he executed the same.

GEO. P. GORDEL,
[L. S.] *Notary Public, N. Y. Co.*

STATE OF NEW YORK, }
City and County of New York, Southern District of New York, } ss:

On this 28th day of March, 1887, before me personally came
55 George S. Bowdoin, to me personally known and known to me to be one of the persons named in and who executed the foregoing instrument, and acknowledged that he executed the same.

GEO. P. GORDEL,
[L. S.] *Notary Public, N. Y. Co.*

CIY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

On this 28th day of March, 1887, before me personally came Wilhemus Mynderse, to me personally known and known to me to be one of the proctors for the claimant, John Morris, named in and

who executed the foregoing instrument, and he acknowledged that he executed the same as the act and deed of the claimant, John Morris.

GEO. P. GORDEL,
Notary Public, N. Y. Co.

56 The foregoing bond is approved.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. Patrick Curry, libellant and appellant, ag't The Steamer "Max Morris," her engines, &c., whereof John Morris is claimant, appellant. Bond on appeal. Butler, Stillman & Hubbard, proctors for claimant, 111 Broadway, New York. U. S. circuit court. Filed Mar. 28th, 1887. Timothy Griffith, clerk.

57 By the Honorable William J. Wallace, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Patrick Curry:

Whereas the claimant, John Morris, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said Patrick Curry, and against the said claimant, stating that the said decree is erroneous and praying that the same be reversed, and has filed the security required by law:

Now, therefore, you are hereby cited to appear before the said Supreme Court of the United States, at the city of Washington,
58 in the District of Columbia, on the second Monday of October next, to do and receive what may appertain to *the* justice to be done in the premises.

Given under my hand and the seal of this court, at the city of New York, in the second circuit, the 28th day of March, in
[L. S.] the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. Patrick Curry, libellant and appellant, ag'st The Steamer "Max Morris," her engines, &c., whereof John Morris is claimant, appellant. Citation. Butler, Stillman & Hubbard, proctors for claimant, 111 Broadway, New York. Due, timely, personal service of a
59 copy of within citation is hereby admitted. March 28th, 1887. Randolph B. Martine, proctor for libellant. U. S. circuit court. Filed Mar. 28th, 1887. Timothy Griffith, clerk.

60 THE UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

Seal of the Circuit Court, Southern Dist. New York.

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to fifty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Patrick Curry, libellant and appellee, against The Steamer Max Morris, her engines, &c., whereof John Morris is claimant, appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and eleventh.

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 332. The Steamer "Max Morris," her engines, &c., John Morris, claimant, appellant, *vs.* Patrick Curry. Filed June 10, 1887.

Office Supreme Court U. S.
FILED
MAY 9 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

WASHINGTON, D. C.

PATRICK CURRY,
Libellant and Respondent,

AGAINST

THE STEAMSHIP "MAX MORRIS," her engines, &c., whereof John Morris is
Claimant and Appellant.

Points on behalf of Libellant and Respondent.

I.

The libel in above-entitled matter was filed to recover damages for personal injuries sustained by libellant while working on board the S. S. *Max Morris*. The proctors for the respective parties have agreed to submit the matter to this Court upon the accompanying statement of facts. While the libellant and his proctor contended upon the trial and still contend that the libellant was not

guilty of any negligence contributing to his injury, but that the injury arose solely through the faulty construction of the *Max Morris* and the carelessness of her officers. Still the poverty of the libellant prevented him from printing the necessary testimony to present this question to the Circuit Court, and therefore for the purposes of this appeal the said statement is conclusive as to the facts. It is therefore only necessary for this Court to decide the single question: has an Admiralty Court, in the exercise of its equitable jurisdiction, the power to decree decreased damages to a libellant for personal injuries in a case where the Court finds, as a fact, that there was some slight degree of carelessness upon the part of the libellant, but also finds that there was negligence upon the part of the vessel and her officers, without which the accident occasioning injury could not have occurred?

II.

The power of an Admiralty Court to divide damages in maritime cases is well established, and it is the constant practice of our Admiralty Courts so to do; it is unnecessary to cite authority to sustain such a well-established rule; but it might be well to remark, that the said rule is not confined (as erroneously supposed by many) to cases of collision, but extends to other cases of admiralty jurisdiction.

Snow *vs.* Carruth, 1 Spr., 324.
Christian *vs.* Van Tassel, 12 Fed. Rep., 884.
The *Syracuse*, 18 *id.*
The *Reba*, 22 Fed. Rep., 546.

In the cases above cited no recovery could have been had by the libellant, if his cause had been judged by the stringent and harsh rules of the common law,

which act as a dismissal of the complaint of an injured plaintiff if he be guilty of the slightest carelessness, no matter how trivial, and no matter how great the defendant's negligence may have been. The common law courts recognizing the hardship of such a rule endeavor to get round it and do substantial justice by leaving in all cases the question of negligence to the jury. An Admiralty Court, sitting without a jury and with plenary equitable powers, has certainly the power to apply this well-known admiralty principle of divided damages to cases of personal injury, as it has already repeatedly done to cases of injury to property. Courts of admiralty are not bound by any rule of the common law courts, when such rules will militate against the doing of substantial justice.

III.

The doctrine has been already applied by Judge Pardee in a case very similar to the one at bar, and divided damages decreed to the libellant.

The *Explorer*, 20 Fed. Rep., 135.
The *Wanderer*, 14 *id.*, 140.

The above were cases of personal injury.

IV.

There is no practical difficulty in dividing the damages in personal injury cases so as to do substantial justice.

See the Decision of Judge Brown in this case.

It is as simple as in cases of injury to property where such decision has been repeatedly made by Admiralty Courts.

V.

Reasons of justice and public policy strongly urge that the rule of divided damages in the discretion of the Court be applied to cases of personal injuries far more strongly than such reasons apply to cases of injury to personal property, where the rule has been repeatedly applied.

VI.

The respondent respectfully calls attention to the able argument of the learned District Judge in favor of the application of the rule in question to cases such as the one at bar, and makes the opinion of Judge Brown a part of this brief.

All which is respectfully submitted.

James A. Patrick,
Proctor for Libellant and Respondent,
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New York City.

Office Supreme Court U. S.
FILED.
MAY 3 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

PATRICK CURRY,
Libellant,

AGAINST

The steamer MAX MORRIS, her engines, &c., whereof JOHN MORRIS is Claimant,
Appellant.

No. ~~332~~ 44

APPELLANT'S BRIEF.

The libellant was a longshoreman engaged in loading coal upon the steamer *Max Morris* in New York, and he brought this action to recover for personal injuries received while in such employ in falling from the lower bridge of the steamer to the deck (*Libel.*, *Record*, 23).

The District Court found that the steamer was to some degree in fault, and that the libellant was also in fault, and in the way of apportionment of damages, gave the libellant a decree for $150 damages (*Decree*, *Record* 13).

Upon the steamer's appeal the case first came before Circuit Judge WALLACE, who wrote an opinion for affirmance (Record, 18–28). Upon a reargument, duly granted before Circuit Judge WALLACE, Mr. Justice

BLATCHFORD sitting with him, Judge WALLACE adhered to his views, Mr. Justice BLATCHFORD dissenting; and thereupon a certificate of division was made, and a decree was entered by Circuit Judge WALLACE against the steamer for apportioned damages (Record, 35, 36).

The certificate of division of opinion states as follows: "This is an action in admiralty under a libel "filed on the 1st day of November, 1884, in the United "States District Court for the Southern District of "New York, to recover for personal injuries suffered by "the libellant on board the Steamship *Max Morris* in "the port of New York, on the 27th day of October, "1884.

"The libellant was a 'longshoreman, a resident of "the city and county of New York, and was at the "time when the said accident occurred employed as a "'longshoreman by the hour by the stevedore having "the contract to load coal on board the steamship *Max* "*Morris*. The injuries to the libellant were occasioned "by his falling through an unguarded opening in the "rail on the after end of the lower bridge. The *Max* "*Morris* was a British steamship, hailing from Liver-"pool, England.

"The defendant contends, as a matter of defense to said "libel, that the injuries complained of by libellant were "caused by his own negligence. The libellant contends "that the injuries to the libellant were occasioned entire-"ly through the fault of the vessel and her officers. The "Court finds, as a matter of fact, that the injuries to "libellant were occasioned partly through his own neg-"ligence and partly through the negligence of the of-"ficers of the vessel.

"*It now occurs as a question of law whether the libel-*"*lant, under the above facts, is entitled to a claim for di-*"*vided damages.* On this question the opinions of the "judges are in conflict.

"Whereupon, on motion of the advocate for the "claimant and appellant, that the point on which the

" disagreement has happened may, during the term, be " stated under the direction of the judges and certified " under the seal of the Court to the Supreme Court, to " be finally decided.

" It is ordered that this statement of facts and the " said question in difference be certified according to " the request of the claimant and appellant and the law " in that case made and provided, under the seal of this " Circuit Court, to the Supreme Court of the United " States " (*Record*, 30–32).

The opinion of Circuit Judge WALLACE, affirming the decree of the District Court, and directing a decree in favor of the libellant is printed (*Record*, 18–28).

The steamship appealed from the decree, and in the petition of appeal sets forth the proceedings in the Circuit Court (*Record*, 43–48).

POINTS.

First.

Whether the accident was due solely to the fault of the libellant, or whether his fault merely contributed thereto, the libel should be dismissed.

The contributory fault of the libellant is established by the facts. " The darkness in this case made it the " duty of the libellant to exercise the greater care in " his movements, or else to supply himself with one of " the several lights that were provided by the ship, but " were unused " (*Record* 8); and by the recital of the certificate of division upon which the case comes before this Court (*Record*, 31).

The rule as invariably applied by the Admiralty Courts

in this class of cases until the recent decision of the *Explorer* by Judge PARDEE, in the Fifth Circuit, has been the wholesome rule that the libellant cannot recover when his own negligence has contributed to the accident.

Such is the rule of the common law. And the civil law from which the principles of the admiralty law are freely drawn is on this point in accord with the common law.

Wharton on Negligence, § 300.

Judge PARDEE, in the *Explorer*, in an action for the recovery of damages for personal injuries, found that the libellant's injuries were due in part to his own negligence, but gave him a decree for a modified amount. He admitted that he was making a new path. He said :

"I do not find that outside of collision and prize "cases, the admiralty courts have claimed or ex- "ercised a different rule as to cases of contribu- "tory, concurrent or comparative negligence from "that applied generally in courts of law "and equity in cases of damage and torts "committed or suffered on land. It is true that as to "*mariners* who are injured, no matter how, in the line "of their duty aboard ship, certain responsibilities as "to care, attention, wages, &c., devolve upon the ship ; "*but I have not been able to find a case where a seaman,* "*freighter or passenger, injured through his own negli-* "*gence, has been allowed to recover damages.* * * * "In the eastern circuits I find that as against landsmen "employed in port to load ships, the courts of law "apply the common law principles of contributory "negligence, &c., and as to the negligence of fellow "employees."

The Explorer, 20 Fed. Rep., 135, 139.

Judge PARDEE finds his sole foundation for his de-

cision in the case of the *Explorer* in certain *dicta* of Justice STORY in the case of *Marianna Flora* (11 Wheaton, 1), decided by the Supreme Court in 1826. The *Marianna Flora* was a prize case, in which the captured vessel was declared by the District Court "no prize," and the matter under the consideration of the Supreme Court was whether the captured vessel should recover damages for her arrest. The Supreme Court denied her claim for damages upon the ground that the circumstances attending the seizure were, through the indiscretions of the *Marianna Flora*, such as to justify the commander of the cruiser, in the fair exercise of his judgment, in making the seizure. In effect the Supreme Court said: the *Marianna Flora* having contributed to the seizure by her own negligence, cannot recover damages. But in the course of their opinion they made certain *dicta* respecting the power of the Court to give or to withhold damages, such as "in cases of marine torts courts of "admiralty are in the habit of giving or withholding "damages upon enlarged principles of justice and "equity," and "they have exercised a conscientious "discretion upon the subject," which Judge PARDEE has construed in such manner as to sustain his decision.

Though the *Marianna Flora* was decided sixty years ago, it had never been deemed to refer to other than prize cases.

It is significant that in every case in which a decree has been given in favor of a landsman for personal injuries, there is an express finding that the libellant was free from any fault.

"The libellant was in no manner negligent or in "fault, whereby he contributed to his said injury."

Leathers vs. Blessing, 105 U. S., 626.

"The libellant was guilty of no negligence" (Judge BENEDICT).

The Calista Haws, 14 Fed. Rep., 493.

" The libellant was not in any degree in fault for the " falling of the dunnage " (Judge BENEDICT).

The Kate Cann, 8 Fed Rep., 719.

" The proofs do not justify an inference that the li- " bellant was negligent " (Judge WALLACE).

The Rheola, 19 Fed. Rep., 926.

Judge DEADY expressly held " contributory negligence " is a defense to the action," the claim being prosecuted in the Admiralty Court by a libel *in personam*.

Holmes vs. Or. & Col. R. R. Co., 5 Fed. Rep., 523, 528.

And again, Judge DEADY held :

" Admitting the negligence of the mate, and that the " master or owner and the vessel are liable therefor, " still *if the negligence of the libellant substantially con- " tributed to produce the injury*, he could not recover " damage therefor."

The Chandos, 4 Fed. Rep., 645, 649.

Judge BLATCHFORD has stated the rule as follows :

" The owner of a vessel is liable *in personam* and the " vessel is liable *in rem* for injuries done to person or " property by the negligence of the master and crew of " the vessel, *only where the owner would, under the same " circumstances*, be liable in a suit at common law."

The Germania, 9 Benedict, 356.

And in a case decided two months later than the *Explorer*, Judge PARDEE seems to have modified his novel views. He says :

" Nor in the admiralty should one, as a general rule, " be compensated in damages who has, by his own " fault contributed to bring about his own injury."

The E. B. Ward, 20 Fed. Rep., 702, 704.

Second.

The admiralty rule of division of damages, applicable to collision cases, has never been applied to cases of personal injuries.

The rule of dividing damages in cases of mutual fault, applies only to collision cases, and arose probably from the fact that, in such cases, damages was sustained by both parties; and that the collision occurred, not through the personal negligence of either of the ship-owners, but through the negligence of their servants.

Cleirac calls it a *judicium rusticum* (*Us est Coutumes de la Mer*), and his commentator, Mr. Bell, translates his words as follows: "This rule of division is a rustic "sort of determination such and as arbiters and amica-"ble compromisors of disputes commonly follow where "they cannot discover the motives of the parties when "they are faulty on both sides" (*Bell's Comm.*, 5th Ed., 581).

The rule was not recognized by the Supreme Court in collision cases until 1854.

Up to that time apparently, collisions in which both vessels were in fault, were not as common as they are now-a-days, for Judge NELSON said:

"It becomes necessary to settle the rule of damages "in a case where both vessels are in fault. *The ques-"tion, we believe, has never until now come before the "Court for decision.* The rule that prevails in the Dis-"trict and Circuit Courts, we understand, has been to "divide the loss. This seems now to be the well-set-"tled rule in the English admiralty. * * * *Under "the circumstances usually attending these disasters,* we "think the rule dividing the loss the most just and "equitable."

The Schooner Catherine, 17 Howard, 173.

It is apparent that the rule is confined to collision

cases, and that there is no precedent for its application elsewhere. Mr. Marsden, a renowned authority in England, writes fully of the origin of the rule, and confines its application to collision cases, stating that the "division of the loss in case of collision and maritime "lien are two of the most striking peculiarities of ad- "miralty law" (*Law Quarterly Review*, July, 1886, p. 357).

If the Admiralty Courts proposed to cover other than collision cases, or cases arising directly through navigation, there would be numerous precedents to be found.

The cases cited by the District Judge, as indicating a wider application of the doctrine of apportionment than to collision cases (*Record, fol. 10*), do not warrant a decree of apportionment in this case.

Excepting *Snow vs. Carruth*, *all* those cases arose in the Southern District of New York; all of them had to do directly and immediately with questions of faulty navigation, and all except one arose between a tug and its tow; two of them were purely collision cases, the collision being between the tow and a pier or other stationary obstruction, and the others were based upon exposure of a tow to undue perils.

Apportionment in some of those cases was strictly within the precedent of apportionment in collision cases, and in the others, in that the disaster was not due to the immediate contributory negligence of the vessel owner, but was due to the negligence of the servants of each vessel owner.

The case of *Snow vs. Carruth*, decided by Judge SPRAGUE, is in no way pertinent. There certain cargo was damaged by water through two distinct causes. For one source of damage the ship owner was solely in fault; for the other source of damage he was in no degree in fault. It was impracticable to determine distinctly how much damage was due to each source, and the ship owner was held for one-half the total damage.

There was no suggestion of contributory negligence in the case.

Snow vs. Carruth, 1 Sprague, 324.

Third.

Not only has the wholesome doctrine that the contributory negligence of the libellant defeats an action in the Admiralty Court for persona injuries been uniformly observed until Judge PARDEE'S decision in the *Explorer*, but the more severe rule that a servant cannot recover for injuries sustained through the negligence of a fellow servant has been accepted and enforced.

Judge LOWELL applied it in the Massachusetts Circuit.

The Victoria, 13 Fed. Rep., 43.

And in the Southern District of New York, Judge BROWN followed the rule to its extremest limit.

The Harold, 21 Fed. Rep., 428.

And the municipal or common law doctrine was also applied by the Circuit Court in New York, affirming.

The Edith Godden, 23 Fed. Rep., 43.

It is inconsistant to say that a servant who has been injured through his own negligence can recover half his damages, while he who has been without fault and has been injured through the negligence of his fellow servant can recover nothing.

Fourth.

The learned Circuit Judge (Judge WALLACE) who wrote for affirmance of the decree of the District Court

apparently doubted the correctness of the rule adopted by Judge PARDEE in the *Explorer* (20 Fed. Rep., 135), and followed by Judge BROWN in the District Court (*Opinion*, *Record* 25).

He held himself bound, however, by the decision of this Court in *Atlee vs. The Packet Co.*, 21 Wallace, 389. That was an action brought by the owners of a barge to recover damages for injuries received by their vessel in running against a stone pier alleged to be wrongfully maintained by the respondent in a navigable river. It was held by this Court that the pier was an unlawful obstruction, but it was also held that the barge was negligently navigated, and a decree was ordered in favor of the owners of the barge for half their damages.

But it is apparent that this Court did not, in that case, intend to introduce the collision rule of apportionment into a different class of cases. It may be, possibly, a question whether the striking of a barge against a pier is technically a "collision," and it was with this question in his mind that Judge WALLACE felt that this Court was going outside of collision cases in applying the rule of apportionment.

But the general view, we submit, is that such a disaster is a "collision," and, what is more to the point, this Court, in awarding to the owners of the barge one-half their damages, did so, not by the analogy of collision cases, but because they deemed the case itself one of collision. And in the opinion delivered by the Court there is no implication that the rule of division of damages is applicable to others than collision cases.

The language of the Court, after adverting to the fact that this action might have been brought in a common-law court instead of the admiralty court, is—

"In the common-law court the defendants must pay "all the damages or none. If there has been, on the "part of plaintiffs, such carelessness or want of skill "as the common law would esteem to be contributory "negligence, they can recover nothing. By the rule of

" the admiralty court, where there has been such con-
" tributory negligence, or, in other words, when both
" have been in fault, the entire damages *resulting from*
" *the collision* must be equally divided between the
" parties."

Atlee vs. The Packet Co., 21 Wallace, 389, 395.

The rule of apportionment was recognized only as a rule applicable to collisions.

Fifth.

The decree cannot be sustained by the rule that when a seaman falls sick or sustains injury in the service of his vessel certain responsibilities as to care and attention devolve upon the vessel.

The City of Alexandria, 17 Fed. Rep., 390.

The learned District Judge heard argument upon this point, but very justly held that the rule was not applicable.

The rule, as respects *seamen*, is a proper one, though it seems that it is not enforceable if the sickness or injury of the seaman is occasioned by his own fault.

Curtis' Rights and Duties of Seamen, 109.

Seamen may be injured or fall sick in a far distant foreign port, and it would be inhuman to leave them there without care.

There are even statutory provisions for the payment of their expenses home and for their support in hospitals.

But the responsibility of the ship extends only to the

end of the voyage for which the seaman was shipped or until the seaman reaches his home port.

The Atlantic, Abbott's Adm., 451.
Nevitt vs. Clarke, Olcott, 316.
The Ben Flint, 1 Abbott, 126.

No such responsibility rests upon the *Max Morris* with reference to the libellant. The reason for the rule does not exist as to him.

He was injured at his home. He was not in a foreign port. He was treated and cured at a public hospital (*Record, fol.* 31). His engagement as a 'longshoreman extended only from hour to hour.

Even a seaman has no claim upon his ship for a period beyond the time for which he has shipped or contracted for.

The Atlantic, Abbott's Adm., 451.

Sixth.

The decree of the Circuit Court should be reversed, and the libel should be dismissed. This Court should certify accordingly.

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant, Appellant.

WILHELMUS MYNDERSE,
Advocate.